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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 442

J. EDWIN L·VALLEE and DANIEL McMANN,

Petitioners,

against

JAMES P. CARAFAS, HENRY WILSON and LEON E. WEST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, wardens of the two New York State prisons in which respondents are presently incarcerated,* pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit in the cases of *United States ex rel. James P. Carafas* v. *Murphy* (judgment entered June 22, 1964); *United States ex rel. Henry Wilson* v. *Murphy* (judgment entered July 16, 1964; and *United States ex rel. Leon E. West* v. *LaVallee* (judgment entered July 21, 1964).

* Petitioner LaVallee is at present the Warden of Auburn State Prison, Auburn, New York, where respondents Carafas and Wilson are inmates. Petitioner McMann is Warden of Clinton State Prison, Dannemora, New York, where respondent West is incarcerated.

Citations to Opinions Below

Neither the District Court nor the Circuit Court opinions in any of these cases have as yet been reported. The opinions are reproduced in appendices to this Brief, together with the relevant state opinions. The *Carafas* opinions are contained in Appendix A; the *Wilson* opinions in Appendix B; and the *West* opinions in Appendix C.

Jurisdiction

The judgment of the United States Court of Appeals in the *Carafas* case was entered on June 22, 1964; in the *Wilson* case on July 16, 1964; and in the *West* case on July 21, 1964.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. In view of the deterrent purpose of the exclusionary rule announced by this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), *must* that rule be extended, as a constitutional command, to cases in the appellate process on the date of that decision, so as to vitiate pre-*Mapp* state convictions even in cases where the defendant made no objection to the admission of evidence later claimed to have been illegally seized?

2. Even assuming, *arguendo*, that the Circuit Court was correct in holding that the exclusionary rule must be applied to cases in the state appellate process on the date of the *Mapp* decision, was the Circuit Court's remand of these cases to the District Court with directions to determine the merits of the prisoner's claims—without opportunity for litigation in the state courts of the factual issues

—such a departure from the proper course of judicial proceedings as to call for the exercise of this Court's power of supervision over the federal judiciary?

Statement of the Case

All of the respondents are New York State prisoners, convicted at trials held prior to the decision of this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Each appealed his conviction, raising on appeal the question of whether the *Mapp* decision required reversal of the conviction on the ground that illegally obtained evidence had been introduced at trial. In each instance the convictions were affirmed by the State's appellate courts, and the respondents then applied to the United States District Court for the Northern District of New York for writs of habeas corpus pursuant to 28 U.S.C. § 2241 *et seq.* These applications were denied. On appeal to the Court of Appeals for the Second Circuit, however, the District Court decisions were reversed and the cases remanded for determination of the merits of the respondents' claims that evidence illegally seized was used against them.

The position of the New York State courts with respect to application of the *Mapp* holding has been clearly set forth—the exclusionary rule is applicable as a constitutional command in all trials taking place after June 19, 1961 (cf. *People* v. *Loria*, 10 N. Y. 2d 368, 370 [1961]); it is applied to pre-*Mapp* convictions only when still in the process of direct appellate review on the date of the *Mapp* decision (cf. *People* v. *Muller*, 11 N. Y. 2d 154 [1962]), and only where sufficient objection has been made at the trial (see *People* v. *Friola*, 11 N. Y. 2d 157 [1962]; *People* v. *O'Neill*, 11 N. Y. 2d 148 [1962]; *People* v. *Coffey*, 11 N. Y. 2d 142 [1962]). In addition, an intermediate appellate court may, regardless of whether objection was made at trial, reverse a pre-*Mapp* conviction in the inter-

ests of justice or because the trial court judgment was against the weight of the evidence, and may, in making such a determination, consider the circumstance that illegal evidence was taken (see *People* v. *Kelly*, 12 N. Y. 2d 248 [1963]).

In its opinion in the *Carafas* case, dated June 22, 1964 the Court of Appeals first said that both this Court and the New York Court of Appeals "have clearly held that *Mapp* applies to cases in the appellate process at the time of that decision, at least where sufficient objection was made at the pre-*Mapp* trial to preserve the constitutional question for state appellate review. *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *Ker* v. *California*, 374 U. S. 23 (1963); *People* v. *Loria*, 10 N. Y. 2d 368, 179 N. E. 2d 478, 223 N.Y.S. 2d 462 (1961)" (11a).*

The Circuit Court then went beyond the previous cases as it read them and held that, under its decision in *United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12 (2d Cir. June 11, 1964), the failure to object could not be considered a waiver under *Fay* v. *Noia*, 372 U. S. 391 (1963), and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938) (12a).

Turning to the question of whether or not Carafas had exhausted his state remedies, the Court below pointed to language in decisions of the New York Court of Appeals and the Appellate Division to the effect that each of those courts had considered Carafas' constitutional claim, in support of a finding "that both courts treated the possibility of failure to object at trial as irrelevant" (12a). In view of that finding, the Circuit Court deemed it "wasteful of time and judicial resources" to require any further state court proceedings (13a). The case was accordingly remanded to the District Court for a determination on the merits (13a).

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* Numbers in parentheses followed by the letter "a" refer to pages in the appendices to this brief.

On July 16, 1964 the Court of Appeals reversed and remanded the *Wilson* case in light of the *Carafas* decision (22a).

On July 21, 1964 the Circuit Court decided the *West* case. The New York Court of Appeals had previously held that West's conviction was valid, reversing an Appellate Division decision vacating West's conviction (23a-25a). The state Court of Appeals had held that West waived his right to appeal on the *Mapp* issue because of his counsel's failure to object to the introduction of the evidence (25a). Again citing the *Angelet* and *Carafas* cases, the Circuit Court remanded the *West* case to the District Court for a determination of the merits (32a-34a). Since there could be no question that a state court had ever considered the merits, the Circuit Court held that it was sufficient for West to have raised the *Mapp* question on his appeal in the state courts, saying that "no further state court proceedings were necessary for him to exhaust his state remedies, and the case is now ready for federal court action" (33a).

Reasons for Granting the Writ

I. In holding that the exclusionary rule announced in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), must be applied to all direct appeals pending at the time of the *Mapp* decision, the Circuit Court has decided an important question of federal law—i.e., the minimum extent to which the exclusionary rule must be applied retroactively—which should be settled by this Court.

The question of the extent to which this Court's decision in *Mapp* v. *Ohio* must be retroactively applied is, of course, of vital significance to the administration of criminal justice in virtually every state of the Union. As the appendix to the opinion in *Elkins* v. *United States*, 364 U. S. 206, 224-25 (1960), indicates, some 24 states were, as of June 19[illegible], permitting the use of such evidence at criminal trials in reliance upon the decisions of this Court

in *Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Steffanelli* v. *Minard*, 342 U. S. 117 (1951); and *Irvine* v. *California*, 347 U. S. 128 (1954).

Since the date of the *Mapp* opinion, of course, all of the states have complied with its command that such evidence be excluded at trial; a significant number of the states have, however, sought to limit the impact of the decision by applying the exclusionary rule only to cases still in either the trial or direct appeal stage on the date of the *Mapp* decision.*

Some kind of limitation on the extent to which the exclusionary rule is to be applied is certainly quite in keeping with the announced purpose of the rule—to deter police misconduct. As Mr. Justice STEWART emphasized in his majority opinion in *Elkins* v. *United States*, 364 U. S. 206 at 217:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

See also *Mapp* v. *Ohio*, 367 U. S. 643 (1961) at 656.

Acknowledgment of the fact that the deterrent purpose of the exclusionary rule will in no way be served by the release from prison of persons long since convicted on the basis of evidence whose probative value cannot be doubted, together with recognition of the desirability of leaving general control over the administration of the criminal law to the states insofar as possible, have led a number of courts and commentators to conclude that imposition of

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* See, *e.g.*, *Smith* v. *Crouse*, 192 Kan. 171, 386 P. 2d 295 (1963); *Banks* v. *State*, 228 Md. 130, 179 A. 2d 126 (1962); *Smith* v. *Warden*, —— Md. ——, 197 A. 2d 260 (1964); *Petition of Dirring*, 344 Mass. 522, 183 N. E. 2d 300 (1962); *State ex rel. Beltowski* v. *Tahash*, —— Minn. ——, 123 N. W. 2d 207 (1962); *Erving* v. *State*, 174 Neb. 90, 116 N. W. 2d 7 (1962); *State* v. *Smith*, 37 N. J. 481, 181 A. 2d 806 (1962); *Commonwealth* v. *Mancini*, 198 Pa. Super. 642, 184 A. 2d 279 (1962); *cf. State* v. *Pina*, 94 Ariz. 243, 383 P. 2d 167 (1963).

a federal requirement of general retroactive application of the rule is neither necessary nor wise. See, *e.g.*, the Second Circuit's own opinion in *United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12*; also *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963); *Sisk* v. *Lane*, —— F. 2d —— (7th Cir. 1964); *Gaitan* v. *United States*, 317 F. 2d 494 (10th Cir. 1963); *Bender, The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962); *Traynor, Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319; Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907 (1962).

There is clearly no constitutional requirement that an overruling decision be retroactively applied. Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374 (1940); *Great Northern Ry.* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358 (1932); *James* v. *United States*, 366 U. S. 213, 221 (1960); *Sunal* v. *Large*, 332 U. S. 174 (1946); *Durham* v. *United States*, 214 F. 2d 862, 874 (D. C. Cir. 1954); *Shioutakon* v. *District of Columbia*, 236 F. 2d 666, 670 (D. C. Cir. 1956); *Dooling* v. *Overholser*, 243 F. 2d 825, 829 (D. C. Cir. 1957); *Warring* v. *Colpoys*, 122 F. 2d 642 (D. C. Cir. 1941), cert. denied 314 U. S. 678.

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* In the *Angelet* case, the state appellate process had been concluded prior to the decision of this Court in *Mapp* v. *Ohio*. The State of New York has opposed the granting of Angelet's petition for certiorari (No. 212 Misc., Oct. T. 1964) because it is our position that the Second Circuit's *en banc* decision in *Angelet*, holding that the *Mapp* rule ought not to apply in such a situation, is clearly correct. We further noted, in our brief in opposition, that since this Court had already granted certiorari in a case in which the question of the application of *Mapp* rule where a state conviction had become final prior to the *Mapp* decision was presented (*Linkletter* v. *Walker*, cert. granted 377 U. S. 930, No. 95, Oct. T. 1964), there was no reason for plenary review of the *Angelet* decision. As we indicate in this petition, *infra*, pages 8-9, we feel the questions raised by the instant cases are significantly different from the question raised by the *Linkletter* and *Angelet* cases.

This Court has granted certiorari in *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11 (5th Cir. 1963), cert. granted 377 U. S. 930 (May 18, 1963), No. 95, October T. 1964, to consider the case in which the appellate process was concluded prior to the *Mapp* decision. The instant cases, however, differ from the *Linkletter* case in several significant respects which, we submit, warrant the grant of certiorari here:

(a) In *Linkletter*, the petitioner's direct appeal from his conviction had been decided prior to the date of this Court's decision in *Mapp;* each of the instant cases was in the state appellate process when *Mapp* was decided on June 19, 1961.

(b) In *Linkletter*, the petitioner had objected at trial to the introduction of evidence claimed to be illegally seized; in each of the instant cases, the state courts have found that sufficient objection was not made at trial to the introduction of the evidence later claimed to have been illegally seized.*

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* There is some implication, in the Circuit Court's *Carafas* opinion, that New York had been unfaithful to its own rule requiring objections, and had in fact considered the merits of the search and seizure claims (App., p. 13a). In fact, however, Carafas' conviction was affirmed by the New York Court of Appeals just three weeks after that Court had held—in *People* v. *Friola*, 11 N. Y. 2d 157 (1962); *People* v. *O'Neill*, 11 N. Y. 2d 148 (1962), and *People* v. *Coffey*, 11 N. Y. 2d 142 (1962)—that a claim of improper admission of illegally seized evidence would be reviewed as a question of law only if sufficient objection had been made at trial. If Carafas had made sufficient objection the court clearly would have sent the case back for a determination by the trial court of the legality of the search. See *People* v. *Coffey*, *supra*, at 147.

Nor is the Circuit Court's assumption (App., p. 13a) that the Appellate Division adjudicated the merits of Carafas' search and seizure claims on reargument a valid one—as the Court of Appeals reinstatement of respondent West's conviction (12 N. Y. 2d 1090, 1091 [1963]; *infra*, p. 25a) amply demonstrates, the Appellate Division, on reargument, could have found the search illegal and still have affirmed, simply on the ground that it would not be "in the interests of justice" to reverse the conviction.

(c) In *Linkletter*, the validity of a state conviction was upheld; in the instant cases, the Circuit Court has held that the exclusionary rule must be applied retroactively to an extent not previously recognized by this Court, and has in the process upset state convictions and rejected New York case law holding that persons who have not preserved their *Mapp* claims by objection at trial are not entitled to consideration of the merits of their claims.

* * *

An overruling of the Second Circuit's decisions in these three cases would minimize the disruptive effects of the *Mapp* decision upon state administration of the criminal law, without in any way thwarting achievement of the purpose of the *Mapp* rule. At the same time, it would be consistent with the post-*Mapp* decisions of this Court which have held the exclusionary rule applicable to pre-*Mapp* state convictions only in situations where the defendant had objected at trial and the state courts had considered the issue of the legality of the search on appeal after *Mapp*. *Ker* v. *California*, 374 U. S. 23, 43-44 n. 15 (1963); *Fahy* v. *Connecticut*, 375 U. S. 85, 86 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964).

The Circuit Court apparently rejected the New York rule (requiring objection at trial in order to raise a *Mapp* claim on post-*Mapp* direct appellate review) on the ground that a defendant's failure to object at a pre-*Mapp* trial cannot be construed as a waiver under federal standards. The difficulty with this reasoning, however, is that it *assumes* that there is a federal right to have the exclusionary rule applied in all cases still in the ordinary appellate process on the date of the *Mapp* decision regardless of whether objection was made; it ignores the fundamental question of whether the retroactive application of the rule can be more strictly limited. The New York limitation is not illogical; it grants the benefit of the rule to all defend-

ants who objected at trial as did Miss Mapp, and whose cases could therefore have been the vehicle for overruling *Wolf* v. *Colorado*. Recognition of its validity by this Court would represent a long step toward orderly administration of criminal justice.

II. Assuming *arguendo* that the Circuit Court was correct in holding that the exclusionary rule must be applied to cases in the state appellate process on the date of the *Mapp* decision, the Court's remands of these cases to the District Court with directions to determine the merits of the search and seizure claims was such a departure from the proper course of judicial proceeding as to call for the exercise of this Court's power of supervision over the federal judiciary.

In *Jackson* v. *Denno*, 377 U. S. ——, 12 L. Ed. 2d 908 (1964), this Court reaffirmed the historic role of the states as primarily responsible for administration of the criminal law; the Court made it clear that litigation of the facts necessary to a determination of a constitutional issue should take place, at least initially, in the state courts rather than in a federal habeas corpus court. 377 U. S. at ——, 12 L. Ed. 2d at 925.

The Circuit Court, in remanding these three cases to the District Court with directions to determine the merits of respondents' claims—without any provision for litigation in the state courts of the factual issues relevant to adjudication of the claims—has wholly disregarded the policy of the *Jackson* decision and the purpose of the exhaustion requirement of 28 U.S.C. § 2254.

The state courts are, of course, more familiar with problems of state law which frequently determine the threshold question in a search and seizure case (*cf. United States ex rel. Lupo* v. *Fay*, 332 F. 2d 890, 893 [2d Cir. 1964]). Moreover, they are just as responsible as the federal courts for the protection and enforcement of the constitutional rights of defendants.

The Circuit Court, in these three cases, however, has in effect created a "right" not previously recognized either by this Court or by the courts of the State of New York—a right to have the *Mapp* rule applied to a case in the ordinary appellate process on the date of the *Mapp* decision even if no objection was made at trial. If such a right is indeed determined to exist, the New York courts ought at least to have the opportunity to vindicate it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, August 28, 1964.

Respectfully submitted,

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